

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Schools and Libraries)	CC Docket No. 02-6
Universal Service Support Mechanism)	
)	
Request for Review and/or Waiver)	
By Stockton Unified School District,)	Application No. 321303
Stockton, California)	FRN 856634

**REQUEST FOR REVIEW AND/OR WAIVER
BY THE STOCKTON UNIFIED SCHOOL DISTRICT OF A FUNDING DECISION
BY THE UNIVERSAL SERVICE ADMINISTRATIVE COMPANY**

Pursuant to sections 54.719 and 54.722 of the Commission's rules,¹ the Stockton Unified School District (Stockton or the District) hereby respectfully requests a review of a Universal Service Administrative Company (USAC) decision to adjust a 2002 funding request and to continue to seek recovery of "improperly" disbursed E-Rate funding.

In this instance, Stockton respectfully requests the Bureau waive the 60-day filing deadline² associated with this submission as the facts presented have taken considerable time to compile given more than 11 ½ years have passed since the audit finding from which the Recovery of Improperly Disbursed Funds Letter was established, and repeated requests to USAC (since June, 2017) for any documentation to support the recovery action have not been fruitful. Stockton contends that it should be afforded the additional time required to dig through their own documentation, what is left of it, considering the Funding Year in question is 2002/2003 (15 years ago) in order to mount its own defense against USAC's Demand(s) for Payment considering USAC does not appear to be subject to any time limit or administrative requirement to seek recovery or provide documentation to the aggrieved party.

¹ 47 C.F.R. § 54.719(b), (c); 47 C.F.R. § 54.722(a).

² § 54.720 (a) establishes a 60-day deadline for filing a Request for Review of a decision made by the Administrator.

The Commission may waive any provision of its rules on its own motion and for good cause shown.³ A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.⁴ In addition, the Commission may take into account considerations of hardship, equity, or **more effective implementation of overall policy** (*emphasis added*) on an individual basis.⁵ In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.⁶

Stockton Unified School District contends that its deadline waiver request should be granted as there are additional meritorious facts that have come forth as Stockton has sought to rediscover the circumstances present in Funding Year 2002 despite USAC's inability or unwillingness to provide any documentation to support its recovery action.

Finally, in support of our request for waiver of the deadline to file this Request for Review, Stockton would like to remind the Bureau that in the Fifth Report and Order, the Commission opined upon the 'appealable actions' when they stated, "[E-rate participants] may challenge any action of USAC - including the issuance of a demand for recovery of funds - by filing a request for review with this Commission pursuant to section 54.722 of our rules".⁷

Stockton Unified School District's most recent Demand for Payment notification is dated February 20, 2018. We are unaware that the statement above has been changed or rescinded in any way since the issuance of the Fifth Report and Order.

We are very hopeful the Commission will find good cause to waive the deadline in order that the record can be fully developed in this case.

Accordingly, after careful review of the facts presented herein, the Commission

³ 47 C.F.R. § 1.3.

⁴ Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (Northeast Cellular).

⁵ WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), aff'd, 459 F.2d 1203 (D.C. Cir. 1972).

⁶ Northeast Cellular, 897 F.2d at 1166.

⁷ *In the Matter of Sch. & Libraries Universal Serv. Support Mechanism*, 19 F.C.C. Rcd. 15808, 15821 (2004) (*emphasis added*).

should grant this Request for Review, and/or any waivers necessary or warranted, and remand the above-captioned application and funding request to USAC with instructions to cancel this recovery request.

EXECUTIVE SUMMARY

Stockton Unified School Districts seeks review and rescission of a Recovery of Improperly Disbursed Funds (“RIDF”) Letter from USAC dated June 17, 2017,⁸ an Administrator’s Decision on Appeal Letter dated November 20, 2017,⁹ a First Demand Payment Letter dated January 17, 2018¹⁰ and, a Second Demand Payment Letter dated February 20, 2018¹¹, all demanding Stockton ‘re-pay’ \$18,117.00 based on a flawed performance audit finding issued in December, 2005 for a Funding Request from 2002.

Net56 Memorandum Opinion and Order

It is our belief that USAC initiated this recovery action based on an opinion stated in the FCC’s Net56 Memorandum Opinion and Order¹² (FCC 17-1 dated January 1, 2017). In that Order, the Bureau offered an opinion that essentially created a ‘blank check’ to USAC by opining there is fundamentally no statute of limitations on USAC recovery actions in paragraph 9:

9. Administrative Limitations on Debt Recovery. We also reject Net56’s argument that USAC’s recovery action for funding year 2006 is time-barred by the Commission’s policy directive that USAC finish its investigations and seek recovery within five years of the final delivery of service for a specific funding year. In the Fifth Report and Order, the Commission “for administrative efficiency” announced a policy that inquiries related to wrongful E-rate program disbursements should be completed within five years of the final delivery of service for a specific funding year.¹³ The Commission found that this policy struck “an appropriate

⁸ EXHIBIT A Stockton RIDF Letter 06172017

⁹ EXHIBIT B Stockton Administrator's Decision on Appeal FY 2002 11202017

¹⁰ EXHIBIT C Stockton USD First Demand Letter 01172018

¹¹ EXHIBIT D Stockton USD Second Demand Letter 02202018

¹² https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-1A1.pdf FCC 17-1 (Jan 17, 2017) (Net56 MO&O)

¹³ *Schools and Libraries Universal Service Support Mechanism*, CC Docket 02-6, Fifth Report and Order, 19 FCC Rcd 15808, 15819 (2004) (Fifth Report and Order).

balance between preserving the Commission’s fiduciary duty to protect the fund against waste, fraud and abuse and the beneficiaries’ need for certainty and closure in their E-rate application processes.” We continue to believe that the best course is for USAC to aim to complete its investigations and seek recovery of funds within five years, whenever possible. We therefore direct USAC to incorporate that as an objective in its annual performance metrics plan. But even assuming arguendo that the recovery action fell outside the five-year period within which the Commission recommended that investigations be completed, that time frame constitutes merely a policy preference and not an absolute bar to recovery, unlike a statutory limitations period that Congress may establish. (emphasis added)¹⁴

A reasonable person would tie the issuance of the Net56 Opinion and Order and USAC’s issuance of these recovery actions together quite readily. The ‘blank check’ that USAC saw as a result of this opinion consisted of its almost immediate issuance of hundreds of various Commitment Adjustments (“COMAD”) recovery actions that had been languishing (with no previous USAC recovery action) since the early 2000s; in this case, since a 2005 audit opinion of a 2002 Funding Request.

This Request for Review will demonstrate that the reasoning to support the Recovery of Improperly Disbursed Funds Letter is fatally flawed on every level.

BACKGROUND

On January 10, 2005, USAC initiated a performance audit to be conducted by KPMG for various Funding Requests associated with Funding Year 2002.

Field work for the audit concluded and a final Audit Report was issued 11 months later,

¹⁴ Net56 MO&O ¹² para 9

on December 8, 2005. No actual recovery action was taken by USAC regarding the one monetary finding¹⁵ noted in the Audit report until June 17, 2017 (11 years and 6 months later) when USAC sent Stockton a Recovery of Improperly Disbursed Funds (“RIDF”) Letter¹⁶ for Funding Year 2002 with the following explanation that is fatally flawed in several instances.

Disbursed Funds Recovery Explanation:

After a through [sic] investigation, it has been determined that funds were improperly disbursed on this funding request. During the course of an audit it was determined that the following equipment purchased with the Universal Service funds for FY 2002, (1) FRN 856634, could not be located: Seven switches were missing and one switch was not uninstalled [sic]. The total cost of the equipment was (2) \$18,117.00. (3) FCC rules require that the equipment purchased with program discounts be located at an eligible entity and be utilized effectively for educational purposes. (4) The rules require that applicants retain asset and inventory records of equipment purchased and components of supported internal connections services sufficient to verify the location of such equipment for five years. Since the equipment purchased with Universal Service funds could not be located the above (5) FCC rules were violated. USAC will seek recovery of \$18,117 of improperly disbursed funds from the applicant. (emphasis added)

FATAL FLAWS IN THE REASONING PRESENTED IN THE RECOVERY OF IMPROPERLY DISBURSED FUNDS LETTER

Let us discuss how each of the five items (numbered by Stockton) listed in the RIDF Letter explanation are not valid.

(1) FRN 856634 is ONLY for Grunsky Elementary School. It does not include and products or services provided for McKinley, as stated in the Audit Report.

Audit Finding #144339-F-2002-02 (in Audit Report SL 2005 BE 079 dated December 8,

¹⁵ EXHIBIT E Stockton USD Audit Report SL 2005 BE 079 12102005, page 16 - #144339-F-2002-02

¹⁶ EXHIBIT A Stockton RIDF Letter 06172017

2005)¹⁷ that appears to have prompted issuance of the RIDF references a single 2002 Funding Request (856634) for which funds were disbursed “improperly” for two schools, Grunsky and McKinley; however, Stockton Unified School District filed a single FRN BY SCHOOL on its 2002/2003 Form 471 application # 321303¹⁸. McKinley’s FRN was 856760. At a minimum, the Audit Finding should have allocated the appropriate recovery amount to each school’s FRN.

Also noteworthy is that McKinley does not appear in EITHER LIST of sites¹⁹ visited during the Audit. Stockton wonders how the auditors discovered that ANY equipment was missing or uninstalled for McKinley when the report does not indicate the auditors visited the site?

(2) The RIDF suggests that \$18,117.00 was the total amount of the eight switches initially found to be ‘missing’ or ‘uninstalled’.

While \$18,117.00 was the initial amount noted in Audit Finding #144339-F-2002-02, the record was supplemented and updated to include applicant disclosed information that changed that amount to \$21,558.00 (\$23,953.00 X 90% discount). Stockton contends the following:

- This discrepancy supports our argument that the passage of time between issuance of the Audit Report and issuance of the RIDF is too great and supposes that even USAC does not have all of the documentation to support their claim; and,
- Stockton cannot determine whether the \$18,117.00 is a PRE-DISCOUNT amount or a POST-DISCOUNT amount; and,
- Stockton cannot determine, based on our own time-consuming review of the documentation we were able to find, what COSTS were used to determine either of the amounts listed in the Audit Finding.

¹⁷ EXHIBIT E Stockton USD Audit Report SL 2005 BE 079 12102005, pages 16-17 – please also note that the report has been marked up with comments throughout.

¹⁸ EXHIBIT F Stockton USD FY 2002 471 321303

¹⁹ *Ibid.*, pages 12-13

(3) FCC rules require that the equipment purchased with program discounts be located at an eligible entity and be utilized effectively for educational purposes.

Audit Finding #144339-F-2002-02's criterion references a violation of FCC Rule (54.507 (d)). That part of the rule (*d*) is specific to the deadline to implement services and has nothing to do with requiring equipment purchased with program discounts be located at an eligible entity and be utilized "*effectively*" for educational purposes. The "educational purposes" rule is (54.504(b)(2)(ii) (as referenced by USAC in its response)²⁰ and requires applicants to use the services purchased for educational purposes.

NOTE: Nowhere is the word 'effectively' included in the rule that was in effect then or now.

There was never a discussion during the audit about whether the equipment in question was installed by the deadline to implement service nor were there any discussions as to whether the equipment was or was not used for educational purposes. In fact, Stockton took particular care in describing to the auditors (in their Management Response) that, though some of the equipment was NOT at the site for which it was intended (as listed on the Form 471), **all** of it was found to be installed at OTHER eligible locations unassociated with the "Grunsky FRN 856634" but otherwise "eligible" by definition in the rule(s) referenced in the audit finding.

Finally, in support of the erroneous nature of this statement, Stockton references that it was not until release of the Commission's Third Report and Order on December 23, **2003**²¹ there was even a requirement that equipment purchased with E-Rate support remain at the site for which is was purchased for a period longer than one year.

"In this Third Report and Order and Second Further Notice of Proposed Rulemaking, we address several matters related to the administration of the schools and libraries universal service

²⁰ EXHIBIT E Stockton USD Audit Report SL 2005 BE 079 12102005, page 16

²¹ https://apps.fcc.gov/edocs_public/attachmatch/FCC-03-323A1.pdf

mechanism (also known as the e-rate program)” “We also prohibit a school or library from transferring equipment purchased with universal service discounts, as part of eligible internal connections services, for a period of three years except in limited circumstances...”

“...Our current rules permit applicants in the highest discount bands to upgrade their equipment on a yearly basis, even when existing equipment continues to have a useful life... We also prohibit a school or library from transferring equipment purchased with universal service discounts, as part of eligible internal connections services, for a period of three years except in limited circumstances.”

In summary, when the auditors arrived in 2005, there were applying rules that were codified in 2003 (but not effective until 2005) to Funding Year 2002 Funding Requests when those rules did not exist.

(4) The rules require that applicants retain asset and inventory records of equipment purchased and components of supported internal connections services sufficient to verify the location of such equipment for five years.

In 2002, there was no such rule in place. This fact is supported by USAC’s Response to Other Matter #144339-M-2002-02²² in Audit Report SL 2005 BE 079 (dated December 8, 2005) in which KPMG’s criteria stated Stockton demonstrated weak internal controls associated with asset/inventory management. USAC stated in their response, *“In Funding Year 2002, it is an administrative function, not a program rule requirement or identify equipment and itemize it by make, model, and quantity.”* (emphasis added)

USAC’s response to the “Matter” in the Audit Report continued to suggest *that “Going forward, the applicants should familiarize themselves with the FCC’s Fifth Report and Order²³ [adopted August 13, 2004] which clarified the record keeping requirements...”* This is another instance of

²² EXHIBIT E Stockton USD Audit Report SL 2005 BE 079 12102005, page 22

²³ FCC-03-323A1 at para 47

USAC acknowledging that there were no record keeping and/or record retention rules in place prior to issuance of the FCC's Fifth Report and Order in 2004.

Remember, we are discussing a Funding Request from 2002.

(5) FCC rules were violated.

This statement is patently untrue and particularly so in the context of the RIDF Letter considering the explanation(s) are in conflict with USAC statements in the Audit Report that purportedly predicated the recovery action referenced throughout this document.

CLARIFICATION AND CODIFICATION OF RULES

On August 13, 2004, the FCC released its Fifth Report and Order²⁴ “...*in an effort [to] resolve a number of issues that have arisen from audit activities conducted as part of ongoing oversight over the administration of the universal service fund...First, we set forth a framework regarding what amounts should be recovered by the Universal Service Administrative Company (USAC or Administrator) and the Commission when funds have been disbursed in violation of specific statutory provisions and Commission rules.*”

Though the Fifth Report and Order sought to clarify and codify recovery rules, there was still a need for further clarification for instances that were NOT considered as part of the Fifth R&O; so much so that on January 16, 2009, Dana Shaffer, Chief of the Wireline Competition Bureau issued a letter²⁵ to Scott Barash, Acting Chief Executive Officer of USAC, that was in response to a request from USAC seeking formal guidance on whether or not certain scenarios warranted the recovery of funds. This letter to USAC included a table (Table C) with scenarios that required clarification as they were not specifically addressed in the Fifth Report and Order.

²⁴ FCC-03-323A1

²⁵ <https://transition.fcc.gov/omd/usac-letters/2009/011609-Schools-and-Libraries-Program.pdf> (Table C, issue 3)

Table C Policy Issues

Issue	Relevant Rule	Guidance
3. Services delivered to an entity that was not approved to receive the service on FCC Form 471 for the Funding Request Number (FRN).	4 th R & O, 19 FCC Rcd 15252, ¶15, stating that the service provider is likely to be the responsible party if it delivers services that were not approved for funding under the Form 471.	USAC should determine if the entity should have been listed on the FCC Form 471 and, if so, allow the applicant to amend the FCC Form 471. <i>See</i> letter. Otherwise recover.

Per the FCC letter, if services were found to be delivered to an eligible entity not approved on the FCC Form 471 funding request, the direction is *to not recover funds* but to *allow the applicant to amend the Form 471 and add the entity*. In the case of Stockton's application 321303, all 5 of the recipients of the equipment intended for Grunsky Elementary were already included on the Block 4 of the associated FCC Form 471. Based on FCC's clarifying guidance and the fact that the equipment went to other eligible entities on the Block 4, recovery is not warranted.

STOCKTON UNIFIED'S USAC APPEAL

Stockton presented the "Table C" argument in their timely filed Appeal with the Administrator.²⁶ In addition to the Table C argument, Stockton Unified argued the Document Retention and Administrative Limitations Period(s) codified as part of the FCC's 5th Report and Order clearly established a bright-line that has been crossed in issuing a RFID Letter for an E-Rate Form 471 application that is more than 15 years old and an audit completed more than 11 years ago.

On November 20, 2017, USAC denied Stockton's appeal²⁷. USAC's reason for denying Stockton's appeal was simply:

"It has been determined that this funding commitment is denied because of switches being installed at locations other than the intended location on the [Form] 471."

²⁶ EXHIBIT G Stockton USD 144339 Appeal of Improperly Disbursed Funds

²⁷ EXHIBIT B Stockton Administrator's Decision on Appeal FY 2002 11202017

Nowhere in USAC's response did it appear that USAC considered ANY of the information presented in the appeal submitted by Stockton. Had USAC considered the information presented in the appeal to the Administrator, they should have without hesitation, approved the appeal that was submitted on its merits alone. For its explanation of denial of our appeal to consist solely of this one reason is alarming as it flies in the face of the robust record associated with how and when to recover funding in instances such as those Stockton Unified presented and, is also evidence that Stockton has not been provided its full due process rights as its reasoned arguments to USAC appear to have been dismissed.

CONCLUSION

Where there appears to be some conflict in law and with the opinion the WCB issued in the Net56 Order is the WCB's statement that the "...5-year *investigation completion period adopted in the Fifth Report and Order was in fact only a "suggested policy preference and does not compare to a statutory limitations period that Congress may establish..."* which assumes there is no Congressional statute of limitations applicable in instances such as these.

Section 2462 of Title 28 of the United States Code prohibits USAC from seeking recovery of E-Rate funding more than five years after the funding was disbursed. Section 2462 states that "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained **unless commenced within five years from the date when the claim first accrued.**"²⁸

Even the Supreme Court has explained that statutes of limitations "are 'vital to the

²⁸ 28 U.S.C. § 2462.

welfare of society’ and rest on the principle that ‘even wrongdoers are entitled to assume that their sins may be forgotten.’²⁹ The Court has gone so far as to point out that “[i]n a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain forever liable to a pecuniary forfeiture.”³⁰

For all the myriad reasons described throughout the preceding pages, Stockton Unified School District respectfully requests the Bureau remand the above-captioned application and funding request to USAC with instructions to cancel this recovery request.

Respectfully Submitted,

/S/

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²⁹ *Id.*

³⁰ 3M v. Browner, 17 F.3d at 1457 (*quoting* Adams v. Woods, 6 U.S. (2 Cranch) 336, 341, 2 L.Ed. 297 (1805) (Marshall, C.J.) (emphasis added)).

